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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

## NO. 499

OHIO FARMERS INSURANCE COMPANY,
OHIO FARMERS INDEMNITY COMPANY,

*Petitioners and Appellees below,*

vs.

EZRA LANTZ, ROBERT L. LANTZ, MARIE YODER, CAROL M. YODER, ROBERT D. MYERS, IMOGENE L. MYERS, ELMER L. MILLER, BETTY JANE MILLER,

*Respondents and Appellants below.*

On Petition for a Writ of Certiorari to The United States Circuit Court of Appeals for The Seventh Circuit.

# Brief for Respondents in Opposition

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# INDEX TO RESPONDENTS' BRIEF.


| | PAGE |
|---|---|
| Authorities Cited | ii |
| Citations to Federal Supplement and Federal Reporter | 1 |
| Jurisdictional Grounds | 1 |
| Date of Judgment of Court of Appeals | 1 |
| Date of Denial of Rehearing | 2 |
| Statutory Provision Conferring Jurisdiction | 2 |
| Questions for Review (2) | 2 |
| Concise Statement of Case | 2 |
| Jurisdiction in District Court | 3 |
| Additional Statement of Facts | 4-6 |
| Appeal | 6 |
| Reversal | 6 |
| Rehearing Denied | 6 |
| Certiorari Sought | 6 |
| Argument | 7 |
| Question 1 | 7 |
| Question 2 | 12 |
| Prayer | 16 |

## CASES CITED

PAGE

Bingham Pump Co., Inc., v. Edwards (1941), 9 Cir., 118 Fed. (2nd) 338, 340 ..... 8

Bowles v. Hayes (1946), 3 Cir., 155 Fed. (2nd) 351 .... 11

Bullen v. DeBretteville (1956), 9 Cir. 239 Fed. (2nd) 824, 835 ..... 11

Byrd v. American Guaranty and Liability Insurance Co. (1950), 4 Cir., 180 Fed. (2nd) 246 ..... 15

Campbell v. Aetna Casualty and Surety Co., (1954), 4 Cir., 211 Fed. (2nd) 732 ..... 15

Campbell Soup Co. v. Wertz (1948), 3 Cir., Rehearing denied 1949, 172 Fed. (2nd) 80 ..... 11

Commonwealth Casualty Co. v. Arrigo (1931), 160 Maryland 595, 154 Atl. 136, 77 A.L.R. 1350 ..... 15

Crutcher et al. v. Joyce et al. (1945), Rehearing denied 10 Cir., 146 Fed. (2nd) 518, 520 ..... 11

Cullers v. Commissioner of Internal Rev. (1956), 8 Cir., 237 Fed. (2nd) 611, 617 ..... 9

Culley v. Farm Bureau Mutual Insurance Co. (1946), 224 Ind. 483, 69 N.E. (2nd) 219 ..... 12

Daniel v. First National Bank of Birmingham (1955), 5 Cir., 227 Fed. (2nd) 353, Rehearing denied 1956, 228 Fed. (2nd) 803, 805 ..... 9, 11

Daugaard v. Hawkeye Security Insurance Company (1956), 8 Cir., 239 Fed. (2nd) 351 ..... 15

Farm Bureau v. Emmons (1952), 122 Ind. App. 440, 104 N.E. (2nd) 413 ..... 12

PAGE

Federal Life Insurance Co. v. Sayre (1924), 195 Ind. p. 7, 142 N.E. 223 ..... 13

General Accident Fire and Life Assurance Corp. v. J. Roy Browne et al. (1954), 7 Cir., 217 Fed. (2nd) 418 ..... 10, 11

Gotham Silk Hosiery Co. v. Arteraft Silk Hosiery Mills (1945), 3 Cir., 1947 Fed. (2nd) 209, 222 ..... 11

Graham v. U. S. (1957), 9 Cir., 243 Fed. (2nd) 919, 923 ..... 11

Hawkeye Security Ins. Co. v. Presbitero & Sons et al. (1954), 7 Cir., 209 Fed. (2nd) 281 ..... 14

Helvering v. Minnesota Tea Company (1935), 296 U.S. 378, 80 L. Ed. 284, 56 S. Ct. 269 ..... 12

Helvering v. Tex. Penn Oil Co. (1936), 300 U.S. 506, 81 L. Ed. 772, 57 S. Ct. 554 ..... 12

Himmel Bros. Co. v. Serrick Corp. (1941), 7 Cir., 122 Fed. (2nd) 740 ..... 11

In re Imperial Irr. Dist. (1941), 9 Cir., 38 Fed. Supp. 770, affirmed 136, Fed. (2nd) 539, cert. denied 64 S. Ct. 784, 321 U.S. 787, 88 L. Ed. 1078, rehearing denied 64 S. Ct. 940, 322 U.S. 767, 88 L. Ed. 1593 ..... 8

Mercer Casualty Co. of Celina, Ohio v. Kreamer (1937), 105 Ind. App. 358, 11 N.E. (2nd) 84 ..... 15

Mid-States Insurance Co. v. Brandon et al. (1952), 340 Ill. App. 470, 92 N.E. (2nd) 540 ..... 13

Monaghan v. Hill (1944), 140 Fed. (2nd), 31, 33, 9 Cir. ..... 8

PAGE

Penmac Corporation v. Esterbrook Steel Pen Mfg. Co. (1939), D.C. N.Y. 27 F. Supp. 86, 93 ..... 8

Phenix Ins. Co. of Brooklyn v. Lorenz (1893), 7 Ind. App. 266, 33 N.E. 444, 34 N.E. 495 ..... 13

Plumb Tool Co. v. Sanger (1952), 9 Cir., 193 Fed. (2nd) 260, 264 ..... 11

Sly v. Amer. Indemnity Co. of Galveston, Texas (1932), 127 Calif. App. 202, 15 Pac. (2nd) 522 .....14, 15

Spicklemeier v. T. M. Mastin Co. (1940), 107 Ind. App. 350, 24 N.E. (2nd) 797 ..... 24

Truck Insurance Exchange v. Hanson et al. (1953), — Wash. — 254 Pa. (2nd) 494 .....13, 15

United States v. United States Gypsum Co. (1947), 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 ..... 9

Yanish v. Barber (1956), 9 Cir., 232 Fed. (2nd) 939 .... 11

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

## No. 409

OHIO FARMERS INSURANCE COMPANY,
OHIO FARMERS INDEMNITY COMPANY,
*Petitioners and Appellees below,*

VS.

EZRA LANTZ, ROBERT L. LANTZ, MARIE YODER, CAROL M. YODER, ROBERT D. MYERS, DIOGENE L. MYERS, ELMER L. MILLER, BETTY JANE MILLER,
*Respondents and Appellants below.*

On Petition for a Writ of Certiorari to
The United States Circuit Court of Appeals for
The Seventh Circuit.

## Brief for Respondents in Opposition

A. This case is reported in 145 F. Supp. 770, and 246 F. 2d 182. The District Court's opinion appears in Appendix A at page 191 of the petition. The Court of Appeals opinion appears in Appendix B at page 281 of the petition.

B. (i) The judgment of the Court of Appeals was rendered and entered on June 27, 1957.

(ii) The Court of Appeals denied Petition for Rehearing on August 6, 1957.

(iii) The United States Supreme Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit under the provisions of Section 1254 (1), Title 28, United States Code, which provides as follows:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

C. There are presented for review two questions:

1. Did the Circuit Court of Appeals act within the scope of its reviewing authority in reversing the Federal District Court?

2. Whether an insurance carrier, under a liability policy containing an omnibus clause, can deny liability under the policy due to the acts of negligence of a person operating the motor vehicle upon the basis that title to the motor vehicle had been transferred, without notice to the insurer, from the named insured to the driver of the automobile when the insurer at the time of issuing the policy had knowledge that the driver would be one of the persons operating the motor vehicle and had charged an additional premium for this risk when the driver, a minor child, at the time of the issuance of the policy and at the time of the accident was under the supervision and control of the named insured.

D. There are no constitutional provisions, treaties, statutes, ordinances, or regulations affecting the questions presented.

E. This action was commenced in the United States District Court for the Northern District of Indiana, South Bend Division, on February 11, 1955. The plaintiffs are

Ohio corporations having their home officers in LeRoy, Ohio, and the defendants are all citizens and residents of Indiana. The plaintiffs sought a declaratory judgment with respect to the applicability of an automobile liability insurance policy issued to the defendant, Ezra Lantz, to losses which occurred March 11, 1952, after the named insured had transferred all his right, title and interest in the automobile to his minor son without the companies' knowledge or approval. The District Judge entered judgment for the plaintiffs on November 15, 1956, after trial by the court sitting without a jury. Findings of Fact and Conclusions of Law under Rule 52, F.R.C.P., were filed the same date. The issues were submitted in part upon the stipulation of the parties which established: That the Court had jurisdiction of the parties and the subject matter of the action; that on May 6, 1951, the plaintiffs and the defendant, Ezra Lantz, entered into a written insurance contract, appearing as Exhibit 1 in the record, which declared Ezra Lantz to be the sole owner of the automobile insured and which contained standard provisions respecting transfer of the automobile and insurance policy; that on February 16, 1952, Ezra Lantz transferred all his right, title and interest in the insured automobile to the defendant, Robert L. Lantz; that on March 11, 1952, the defendant, Robert L. Lantz, operated said insured automobile into collision with another at the intersection of Highways 33 and 13 in Elkhart County, Indiana, and, other facts pertaining to the demands made by the defendants upon the plaintiffs arising out of said collision.

The pertinent parts of the policy issued by the plaintiffs are as follows:

In the declarations on page 1, *inter alia*, there appear:

| | | |
|---|---|---|
| Item 1. | Name of Insured | *Ezra Lantz* |
| Item 5. | The purposes for which the automobile is to be used are | *Pleasure and Business* |

Item 6. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the Named Insured is the sole owner of the automobile, except as herein stated: *Sole Owner*

In the insuring agreements on page 2, the following, *inter alia*, appear:

*I. Coverage E-1—Collision or Upset*:

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the Declarations as applicable thereto.

*Coverage H—Bodily Injury Liability*:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, • • • sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

*Coverage J—Property Damage Liability*:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

*III. Definition of Insured*:

With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "Insured" includes the Named Insured and also includes any person while using the automobile • • • • provided the actual use of the automobile is by the Named Insured or with his permission. • • • •

On page 4 appear the following conditions:

20. Changes: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy or estop the Company from asserting any right under the terms of this Policy; nor shall the terms of this Policy be waived or changed except by endorsement issued to form a part of this Policy, signed by the President, a Vice-President, Secretary, Assistant Secretary or Treasurer of the Company and countersigned by a duly authorizer agent of the Company.

There is attached to the policy a rider entitled "Broad Coverage Endorsement". Included therein is the following:

3. *Insuring Agreement VIII—Policy Period, Territory, Purpose of Use.*

TERRITORIAL LIMITS EXTENDED

This Insuring Agreement is amended to read as follows:

"This Policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the Policy Period, while the automobile is in North America, or the territories or possessions of the United States of America, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the Declarations."

- - - - - - - - - -

The testimony of the plaintiffs' witness, Blosser, and the defendants' witnesses, Ezra Lantz and Robert L. Lantz, is substantially as set forth in the petition.

No motion was filed by any of the defendants under Rule 52 (b), F.R.C.P., seeking amended or additional findings, but the question of the sufficiency of the evidence to

support the findings and the question of the court's conclusions based upon the findings were raised by the defendants on their appeal to the Court of Appeals.

The trial judge concluded that the law was with the plaintiffs on their complaint and against the cross-complainant, Carol M. Yoder; that the plaintiffs were entitled to a judgment; that the automobile in question was not covered by the insurance policy and did not apply to the collision of March 11, 1952; and, that the plaintiffs were not liable to any of the defendants because the insurable interest of Ezra Lantz had ceased.

The defendants Lantz, Yoder, Myers and Miller perfected a timely appeal to the United States Court of Appeals for the Seventh Circuit. The appeal was submitted on the original record and briefs, but contained no appendix, this requirement being waived by a timely petition for authority to appeal on the original record and by stipulation of the parties and order of the Circuit Court of Appeals. The appellees' brief contained an appendix which set forth the pleadings, the stipulation of facts, the findings of fact and conclusions of law, the opinion and judgment of the District Judge. After oral argument and on June 27, 1957, the Court of Appeals reversed the judgment of the District Court with respect to the liability claimants and affirmed with respect to the collision claimants. The Court of Appeals also directed the District Court to enter judgment for Carol M. Yoder on her counter-claim in the sum of Fifteen Thousand Dollars ($15,000.00) and costs and attorney's fees to be fixed by the District Judge.

The plaintiffs presented a timely Petition for Rehearing which the Court of Appeals denied on August 6, 1957.

The Petition for Writ of Certiorari has been filed within 90 days from August 6, 1957.

## F. ARGUMENT

1. The petitioners seek writ of certiorari based upon their contention that the Circuit Court of Appeals has misapplied Rule 52 of the Federal Rules of Civil Procedure and that the intervention of the Supreme Court is necessary to create uniformity between the Circuits in the application of this Rule and so that there will be no radical departure from the accepted and usual course of judicial proceedings.

Respondents do not agree that the Circuit Court of Appeals misapplied Rule 52, but contend that petitioners have failed to correctly construe the intended application of the Rule in the light of the circumstances of this particular case.

The proper application of Rule 52 can be determined only by giving consideration to the following circumstances of this case:

a. The evidentiary facts were not in dispute upon appeal of this case to the Circuit Court of Appeals nor are they now in dispute.

b. The appeal to the Circuit Court of Appeals was made on the entire record before the District Court, including a complete transcript of the evidence, both written and oral.

c. The "finding" by the District Judge, upon which he based his decision, that Ezra Lantz had no insurable interest in the subject automobile at the time of the collision in question, was actually a conclusion of law, or at least a mixed question of law and fact.

d. The case was tried in the District Court, without a jury.

Petitioners argue that the Circuit Court of Appeals had no authority to set aside the District Court's findings of fact because respondents filed no motion to amend the findings in the District Court, and no question was raised as to the sufficiency of the evidence to sustain the District Judge's findings of fact in the Trial Court or on appeal to the Court of Appeals. The cases cited by the petitioners to support this contention are set forth at page 12 of Petition and Brief of the Petitioners. None of the cases cited support this conclusion. Those cases rather dealt with the "clearly erroneous" rule pertaining to the application of Rule 52 which is discussed below.

Respondents respectfully point out that sub-section (b) of Rule 52 clearly states: "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment. Rule 52 (b) Federal Rules of Civil Procedure."

It is sufficient, under the uniform application of Rule 52 that the Circuit Court of Appeals be apprised of the objections of the appellant upon the appeal.

*Monagham* v. *Hill* (1944) 9 Cir. 140 Fed. (2nd) 31, 33.

*In re: Imperial Irr. Dist.* (1941) 9 Cir. 38 Fed. Supp. 770. Affirmed 136 Fed. (2nd) 539 Certiorari denied 64 S. Ct. 784 321 U.S. 787, 88 L. Ed. 1078 Rehearing denied 64 S. Ct. 940 322 U.S. 767, 88 L. Ed. 1593.

*Bingham Pump Co., Inc.* v. *Edwards* (1941) 9 Cir. 118 Fed. (2nd) 338, 340.

*Penmac Corp.* v. *Esterbrook Steel Pen Mfg. Co.* (1939) D.C.N.Y. 27 F. Supp. 86, 93.

On the trial in the District Court the issue as to insurable interest in Ezra Lantz was sharply drawn in the pleadings and in the proposed findings of fact and conclusions of law submitted by the parties. Upon appeal appellants assignment of error in the District Court's findings was clearly drawn and brought before the Circuit Court of Appeals by appeal on the entire record and specifications in the appellant's brief.

The petitioners further contend that the Court of Appeals had no authority to set aside the facts found by the District Court and they contend further that the Circuit Court of Appeals exceeded its reviewing authority by making its own findings.

Respondents respectfully point out that the authorities cited by petitioners do not have application to the circumstances of the instant case. To begin with, the Supreme Court has spoken clearly to the effect that under Rule 52 (a) findings of fact in actions tried without a jury may be set aside and the trial court reversed where, although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

*United States* v. *United States Gypsum Co.* (1947) 333 U.S. 364, 395, 68 S. Ct. 525 92 L. Ed. 746.

*Cullers* v. *Commissioner of Internal Revenue* (1956) 8 Cir. 237 Fed. (2nd) 611, 617.

*Daniel* v. *First National Bank of Birmingham* (1955) 5 Cir. 227 Fed. (2nd) 353 Rehearing denied (1956) 228 Fed. (2nd) 803, 805.

That the Circuit Court of Appeals determined from a review of the entire evidence that a mistake had been committed by the District Judge is apparent from the Court's written decision wherein it is stated:

"It appears from the opinion filed by the district judge that he based his decision on the ground that

> the transfer by Ezra to Robert of the ownership of the car prevented the policy from covering the accident of March 11, 1952. It is apparent that he was led to that conclusion by finding of fact No. 12 that Ezra had no insurable interest in said automobile at the time of the collision." (Page 5 of the written decision of the Circuit Court of Appeals).

It is also clear from the above, that this together with the conclusion that the insurer had knowledge of the risk involved and charged an additional premium for the same, constituted the basis for the reversal of the District Court by the Circuit Court of Appeals and statements to the contrary by petitioners are mere assumptions unsupported by a careful review of the decision of the Circuit Court of Appeals.

Furthermore, the argument by petitioners that Rule 52 would not permit the Circuit Court of Appeals setting aside the District Judge's findings of fact has no application in the case at hand, because the particular finding set aside was actually a conclusion of law or a mixed question of law and fact. The finding, as set forth above, involved a question of insurable interest in Ezra Lantz. The point now raised by petitioner was not raised in the Circuit Court of Appeals, and thus was not covered in that Court's written decision. Had it been raised, the court would undoubtedly have followed the holding made by the same Court in the case of *General Accident Fire and Life Assurance Corp* v. *J. Roy Browne, et al.* (1954) 7 Cir. 217 Fed. (2nd) 418, wherein the point involved was determination of a person acting as agent for insured. The Court through Circuit Judge Schnackenberg, who authored the decision in the instant case, held that such was not a finding of fact but rather a conclusion of law and was not covered by rule providing that findings of fact shall not be set aside unless clearly erroneous. In this the Circuit

Court for the 7th Circuit is simply applying the rule as intended and as applied in the other circuits.

*Bullen* v. *DeBretteville* (1956) 9 Cir. 239 Fed. (2nd) 824, 835.

*Campbell Soup Co.* v. *Wertz* (1948) 3 Cir. Rehearing denied (1949) 172 Fed. (2nd) 80.

*Plumb Tool Co.* v. *Sanger* (1952) 9 Cir. 193 Fed. (2nd) 260, 264.

Respondents also wish to emphasize that the decision of the Circuit Court of Appeals was entirely proper and in conformity with the practice and decisions under Rule 52 in view of the fact that there was no dispute concerning the evidenciary facts and under such circumstance the Court could properly arrive at its own conclusions.

*Daniel* v. *First Natl. Bank of Birmingham* (1955) 5 Cir. 227 Fed. (2nd) 353 Rehearing denied (1956) 228 Fed. (2nd) 803, 805.

*Crutcher et al.* v. *Joyce et al.* (1945) 10 Cir. Rehearing denied 146 Fed. (2nd) 518, 520.

*Himmel Bros. Co.* v. *Serrick Corp.* (1941) 7 Cir. 122 Fed. (2nd) 740.

And the appellate court may, under these circumstances, and with the entire record before it, draw its own conclusions as was done in this case.

*Graham* v. *U. S.* (1957) 9 Cir. 243 Fed. (2nd) 919, 923.

*Yanish* v. *Barber* (1956) 9 Cir. 232 Fed. (2nd) 939.

*General Accident Fire and Life Assurance Corp.* v. *J. Roy Browne, et al.* (1954) 7 Cir. 217 Fed. (2nd) 418.

It is significant that in the two cases cited by petitioners (*Bowles* v. *Hayes*, 1946, 3 Cir. 155 Fed. (2nd) 351 and *Gotham Silk Hosiery Co.* v. *Artcraft Silk Hosiery Mills*,

1945, 3 Cir. 1947, Fed. (2nd) 209, 222) the evidentiary facts before the Circuit Court of Appeals were in dispute.

Finally, respondents herein wish to emphasize that the questions raised by the petitioners and discussed above were raised by the petitioners for the first time in their petition for writ of certiorari and were not mentioned in the appellees' petition for rehearing before the Circuit Court of Appeals though ample opportunity was afforded. Prior decisions of this Court are to the effect that the Supreme Court will not review questions raised for the first time in a petition for writ of certiorari.

*Helvering* v. *Minnesota Tea Company* (1935) 296 U.S. 378, 80 L. Ed. 284, 56 S. Ct. 269.

*Helvering* v. *Tex Penn. Oil Co.* (1936) 300 U.S. 506, 81 L. Ed. 772, 57 S. Ct. 554.

2. The remaining issues in the present case are also definitely narrow and no amount of argument by the Petitioners could broaden them to the extent that they warrant review by this Court. The Indiana cases cited by Petitioners as being contrary to the ruling of the Circuit Court of Appeals are easily distinguishable upon the facts. In the case of *Farm Bureau* v. *Emmons* (1952), 122 Ind. 440, 104 N.E. (2nd) 413, the title to the motor vehicle was transferred to a complete stranger to the insurance transaction, and to a person over whom the named insured had no control or right of supervision. In the instant case, the title was transferred to one who had been accepted by the insurer as a risk and for whom additional premium had been charged. In addition, the named insured had the parental right of control and supervision of his son and the right to grant or withdraw his permission for the son to operate the motor vehicle.

The case of *Culley* v. *Farm Bureau Mutual Insurance Co.*, (1946) 224 Ind. 483, 69 N.E. (2nd) 219, turns upon the

provisions of the policy excluding coverage in those cases where the automobile was operated in violation of law as to age. The present policy contains no such prohibition, and in none of the cases cited by the Petitioners does it appear that the insurance company, through its agent, had knowledge that the person to whom the title was transferred would be the person who would be the driver of the car designated in the policy. Petitioners' flat statement that the decision they seek to have reviewed by this Court affects every policy holder and insurer in the State of Indiana is not supported by the facts. The decision of the Court of Appeals is limited to those cases where it is apparent that the insurer knew of the risk that it was accepting and knew that "use" of the motor vehicle and its "ownership" were separated from the time the policy was written. In so holding, the Circuit Court of Appeals applied the Indiana law that an insurer will be estopped from asserting a forfeiture clause in a policy, if it issues the polic knowing all of the facts.

*Federal Life Insurance Co.* v. *Sayre* (1924) 195 Ind. p. 7, 142 N.E. 223.

*Phenix Ins. Co. of Brooklyn* v. *Lorenz* (1893) 7 Ind. App. 266, 33 N.E. 444, 34 N.E. 495.

It would further appear that the decision of the Court of Appeals is amply supported by the decisions in other state courts and by prior decisions of the Seventh Circuit Court of Appeals.

*Truck Insurance Exchange* v. *Hanson et al* (1953) Wash. ....., 254 Pa. (2nd) 494.

*Commonwealth Casualty Company* v. *Arrigo* (1931) 160 Maryland 595, 154 Atl. 136, 77 A.L.R. 1350.

*Mid-States Insurance Co.* v. *Brandon et al* (1952) 340 Ill. App. 470, 92 N.E. (2nd) 540.

*Hawkeye Security Ins. Co.* v. *Presbitero & Sons et al* (1954) 7th Cir., 209 Fed. (2nd) 281.

*Sly* v. *American Indemnity Co. of Galveston* (1932) 127 Calif. App. 202, 15 Pac. (2nd) 522.

An analysis of these decisions indicate that the Supreme Courts of the various states and the Courts of Appeal have with uniformity held the insurer liable if the risk was one which the insurer accepted when the policy was written. It is so in this case. The uncontradicted evidence is that the insurance company knew from the start that Robert Lantz was to be the driver of the motor vehicle in question. For this risk it had charged and received an additional premium. The risk it accepted was not enlarged by the transfer of the title, since control of the vehicle remained in Ezra Lantz by virtue of his right to control the actions of his minor son.

Further, respondents contend that the Court of Appeals was clearly correct when it reversed the decision of the District Court. It is apparent from the record that the District Court entered a finding for the petitioners upon the assumption that the insurable interest had to exist in the owner of the automobile in order for the liability provisions to apply. There has long been a distinction between liability policies and policies which insure against loss of property in this respect.

An insurance policy which insures against loss of property must be supported by an insurable interest. A policy which provides indemnity against loss, by reason of liability to others, need not be supported by an insurable interest in the named insured.

*Spicklemeier* v. *T. M. Mastin Co.* (1940) 107 Ind. App. 350, 24 N.E. (2nd) 797.

*Truck Ins. Exchange* v. *Hanson et al* (1953) ..... Wash. ....., 254 Pac. (2nd) 494.
*Mercer Casualty Co. of Celina, Ohio* v. *Kreamer* (1937) 105 Ind. App. 358, 11 N.E. (2nd) 84.
*Commonwealth Casualty Co.* v. *Arrigo* (1931) 160 Maryland 595, 154 Atl. 136, 77 A.L.R. 1350.
*Sly* v. *Amer. Indemnity Co. of Galveston, Texas* (1932) 127 Calif. App. 202, 15 Pac. (2nd) 522.

It seems clear to respondents that the petitioners in this case have not been required by the Court of Appeals to do anything which they did not knowingly contract to do in the first instance. One of the risks which petitioners assumed and for which they charged and received an additional premium was the operation of this motor vehicle by Robert Lantz. It is observed that petitioners have failed to discuss this phase of the case, but chose to rely upon a technical interpretation of a portion of the policy which would defeat the intent of the parties.

There is no conflict of decisions. Respondents also seek review by this Court upon the theory that there is an apparent conflict of decisions between the various Circuit Courts of Appeal, citing *Daugaard* v. *Hawkeye Security Insurance Company* (1956), 8 Cir., 239 Fed. (2nd) 351, and *Byrd* v. *American Guaranty and Liability Insurance Co.* (1950), 4 Cir., 180 Fed. (2nd) 246, and *Campbell* v. *Aetna Casualty and Surety Co.* (1954), 4 Cir., 211 Fed. (2nd) 732.

Respondents suggest that the *Daugaard* case and the *Campbell* case involve the interpretation of a clause in liability policies covering the owner while driving motor vehicles other than the one described in the policy.

The *Byrd* case is distinguishable from the instant case because in that case the motor vehicle was transferred to a third person who was a stranger to the entire transaction and who had not been accepted by the insurer as a risk at the time of the collision and there were no grounds upon which it could be said that the insurer had waived the provisions of the policy.

The petitioners do not contend that there is involved any question of federal law to be reviewed.

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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